

**SEN MEDIA SDN BHD v.
PERUNDING PAKAR MEDIA SDN BHD & ORS**

COURT OF APPEAL, PUTRAJAYA

ZAHARAH IBRAHIM JCA

AZAHAR MOHAMED JCA

ABDUL AZIZ RAHIM JCA

[CIVIL APPEAL NO: W-01(NCC)(W)-29-01-2013]

28 SEPTEMBER 2015

CIVIL PROCEDURE: *Third party proceedings – Indemnity – Appellant failed to pay first respondent due to non-payment of third party (statutory body) to appellant – Whether appellant entered into contract with statutory body for supply of services – Whether appellant should be indemnified by statutory body – Whether services rendered by first respondent benefited statutory body – Whether previous payments paid by statutory body to appellant in breach of treasury instructions – Whether there was a valid contract – Whether High Court Judge erred in dismissing appellant’s claim against statutory body – Whether appellate intervention warranted*

The first respondent (‘PPM’) and the appellant (‘Sen Media’) were media companies. Sen Media carried on the business of selling ‘time slots’ for advertisements to its clients who wish to advertise their products/services in all forms of media. Sen Media appointed PPM as the media agency to purchase the timeslots for this purpose. PPM provided to Sen Media ‘media services’ by placing and paying for ‘advertisement placements/bookings’ in the print and electronic media. Sen Media failed to pay the sums claimed by PPM because it did not receive payments from the second third party (‘Majlis Sukan Negara’). As such, PPM sued Sen Media for unpaid media services rendered. Sen Media then commenced third party proceedings against Majlis Sukan Negara to be indemnified by Majlis Sukan Negara in the even the court found liability against it as against PPM. The crux of the Sen Media’s case was that it had obtained a media contract (‘Media Plans’) from Majlis Sukan Negara and in turn, it had appointed PPM to place and secure the bookings in the print and electronic media for the benefit of Majlis Sukan Negara. In dismissing Sen Media’s claim against Majlis Sukan Negara, the High Court held that the earlier payments made by Majlis Sukan Negara to Sen Media was made in breach of Treasury Instructions and that there was no proper written contract with Majlis Sukan Negara. Hence, the present appeal. The main thrust of the contention of Sen Media was that the High Court fell into error in failing to consider and recognise that Majlis Sukan Negara had received all the benefits of the acts done by Sen Media and yet, Majlis Sukan Negara had not paid fully for it.

Held (allowing appeal with no order as to costs)

Per Azahar Mohamed JCA delivering the judgment of the court:

- (1) Majlis Sukan Negara had agreed to the Media Plans, which were proposed by Sen Media. Majlis Sukan Negara is a statutory body established under the provisions of the National Sports Council of

- A Malaysia Act 1971 ('Act') and has the power to enter into any contract pursuant to s. 4(2) of the Act. The then Director-General of Majlis Sukan Negara had signed and approved these Media Plans on behalf of Majlis Sukan Negara. Majlis Sukan Negara had received benefits of the media services rendered by PPM on behalf of Sen Media and knew that
- B work was carried out in terms of the media services. There were never any objections from Majlis Sukan Negara of the services provided, and payments had been made accordingly to the defendant for the media services provided. (paras 22 & 23)
- C (2) Majlis Sukan Negara never pleaded in its defence that there was a breach of Treasury Instructions. It was also never pleaded that as a result of such breach, the contract was invalidated. The issue of Treasury Instructions is an internal matter of the Majlis Sukan Negara and hence the non-compliance by Majlis Sukan Negara, if any, bears no bearing on the contractual obligation of the parties. Failure on the part of Majlis
- D Sukan Negara to comply with the Treasury Instructions did not in any manner invalidate a contract that the defendant had entered into. The Treasury Instructions could not possibly bind Sen Media. (paras 28 & 29)
- E (3) The High Court Judge fell into error and erred in law in deciding that there was no valid contract between Sen Media and Majlis Sukan Negara. This indicated a lack of judicial appreciation on the part of the High Court Judge resulting in Sen Media being prejudiced which warranted appellate intervention. (para 26)

Bahasa Malaysia Translation Of Headnotes

- F Responden pertama ('PPM') dan perayu ('Sen Media') merupakan syarikat-syarikat media. Sen Media menjalankan perniagaan menjual 'slot masa' untuk pengiklanan kepada pelanggan-pelanggan yang ingin mengiklankan produk/perkhidmatan mereka dalam segala bentuk media. Sen Media telah
- G melantik PPM sebagai agensi media untuk membeli 'slot masa' untuk tujuan ini. PPM telah menyediakan 'perkhidmatan media' untuk Sen Media dengan menempah dan membayar untuk 'peletakan iklan/tempahan' dalam media cetak dan elektronik untuk Sen Media. Sen Media gagal membayar jumlah wang yang dituntut oleh PPM kerana tidak menerima bayaran daripada
- H pihak ketiga kedua ('Majlis Sukan Negara'). Oleh itu, PPM telah memulakan tindakan terhadap Sen Media untuk perkhidmatan media yang belum dibayar. Sen Media kemudiannya memulakan prosiding pihak ketiga terhadap Majlis Sukan Negara untuk dipampas oleh Majlis Sukan Negara. Asas kes defendan adalah bahawa ia telah memperolehi kontrak media ('Media Pelan') daripada Majlis Sukan Negara dan seterusnya, telah melantik
- I PPM untuk menempah dan menjamin tempahan dalam media cetak dan elektronik untuk manfaat Majlis Sukan Negara. Dengan menolak tuntutan

Sen Media terhadap Majlis Sukan Negara, Mahkamah Tinggi memutuskan bahawa bayaran terdahulu yang dibuat oleh Majlis Sukan Negara kepada Sen Media telah dilakukan dalam kemungkiran arahan perbendaharaan dan tiada kontrak bertulis yang betul dengan Majlis Sukan Negara. Oleh itu rayuan ini. Tunjang utama hujahan Sen Media adalah bahawa Mahkamah Tinggi terkhilaf apabila gagal mempertimbangkan dan mengakui bahawa Majlis Sukan Negara telah menerima semua manfaat daripada perbuatan yang dilakukan oleh Sen Media akan tetapi, Majlis Sukan Negara gagal membayarnya.

Diputuskan (membenarkan rayuan tanpa perintah mengenai kos)

Per Azahar Mohamed JCA menyampaikan penghakiman mahkamah:

- (1) Majlis Sukan Negara telah bersetuju dengan Pelan Media yang dicadangkan oleh Sen Media. Majlis Sukan Negara adalah sebuah badan berkanun yang ditubuhkan di bawah peruntukan Majlis Sukan Negara Malaysia 1971 ('Akta') dan mempunyai kuasa untuk membuat apa-apa kontrak menurut s. 4(2) Akta tersebut. Ketua Pengarah Majlis Sukan Negara pada ketika itu telah menandatangani dan meluluskan Media Plans bagi pihak Majlis Sukan Negara. Majlis Sukan Negara telah menerima manfaat perkhidmatan media yang diberikan oleh PPM bagi pihak Sen Media dan mempunyai pengetahuan bahawa kerja-kerja dijalankan dari segi perkhidmatan media. Tiada apa-apa bantahan daripada Majlis Sukan Negara berkenaan perkhidmatan yang diberikan dan bayaran telah sewajarnya dibuat kepada defendan untuk perkhidmatan media yang disediakan.
- (2) Majlis Sukan Negara tidak pernah memplidkan dalam pembelaannya bahawa terdapat kemungkiran Arahan Perbendaharaan. Juga tidak pernah diplidkan bahawa akibat kemungkiran berikut, kontrak tersebut tidak sah. Isu Arahan Perbendaharaan adalah soal dalaman Majlis Sukan Negara dan dengan itu ketidakpatuhan oleh Majlis Sukan Negara, jika ada, tidak mempunyai sebarang kaitan dengan kewajipan kontrak antara pihak-pihak. Kegagalan Majlis Sukan Negara untuk mematuhi Arahan Perbendaharaan tidak dalam apa-apa cara membatalkan kontrak yang dimeterai Sen Media. Arahan Perbendaharaan tidak mungkin dapat mengikat Sen Media.
- (3) Hakim Mahkamah Tinggi tersilap dan terkhilaf dalam undang-undang dalam membuat keputusan bahawa tidak ada kontrak yang sah di antara Sen Media dan Majlis Sukan Negara. Ini menunjukkan kurang pertimbangan kehakiman oleh Hakim Mahkamah Tinggi yang menyebabkan Sen Media diprejudis yang mewajarkan campur tangan rayuan.

- A Case(s) referred to:**
Fitzpatrick Contractors Ltd v. Tyco Fire and Integrated Solutions (UK) Ltd [2008] EWHC 1301 (*refd*)
G Percy Trentham Ltd v. Archital Luxfer [1993] 1 Lloyd's Rep 25 (*refd*)
Janagi v. Ong Boon Kiat [1971] 1 LNS 42 HC (*refd*)
Macrotac Enterprise & Ors v. Pengarah Pendidikan Negeri Selangor & Ors [2010] 8 CLJ 592 HC (*refd*)
- B** *Pengarah Pelajaran Wilayah Persekutuan & Ors v. Loot Ting Yee* [1981] 1 LNS 186 FC (*refd*)
Yew Wan Leong v. Lai Kok Chye [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330 SC (*refd*)
- Legislation referred to:**
- C** Contracts Act 1950, s. 8
National Sports Council of Malaysia Act 1971, s. 4(2)(g)
For the appellant - Firoz Hussein Ahmad Jamaluddin (Mohd Hafarizam Harun, Cheng Mai & Muhammad Asmirul Asraf Fadil with him); M/s Hafarizam Wan & Aisha Mubarak
- D** *For the 1st respondent - Ragumaren Gopal; M/s G Ragumaren & Co*
For the 2nd respondent - Nik Mohd Noor (Cynthia Noor Hazean with him); SFC
For the 3rd respondent - Ahmad Shahrir Mohd Salleh; M/s Ramli, Shahrir & Tajul
[Appeal from High Court, Kuala Lumpur; Suit No: D-22NCC-3-2011]
- E** *Reported by Sandra Gabriel*

JUDGMENT

Azahar Mohamed JCA:

- F** [1] In the High Court, the first respondent, Perunding Pakar Media Sdn Bhd (the plaintiff in the High Court), brought a writ action against the appellant, Sen Media Sdn Bhd (the defendant in the High Court), for unpaid media services rendered in the sum of RM2,554,143.62.
- G** [2] The appellant in turn had successfully applied by way of third party proceedings to add two third parties to the first respondent's writ action, namely the second respondent, the Government of Malaysia (the first third party in the High Court), and the third respondent, Majlis Sukan Negara Malaysia (the second third party in the High Court).
- H** [3] We shall be referring to parties in this judgment in the capacity as they were in the High Court.
- [4] After a full trial, the High Court allowed the plaintiff's claim against the defendant for damages in the sum of RM2,523,651.62 with interest of 5% per annum from date of judgment until full satisfaction and costs.
- I** [5] As for the first and second third parties, the High Court held that the defendant failed to establish its case against both the first and second third parties and therefore the High Court dismissed the third party claim against them.

[6] Aggrieved by the decision of the High Court, the defendant filed an appeal to this court, naming the plaintiff, the first third party and the second third party as first, second and third respondents respectively. The plaintiff cross-appealed on the limited issue of the interest awarded by the High Court.

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[7] We heard all the appeals together. At the conclusion of the hearing of the appeals, by a unanimous decision, we:

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(i) dismissed the defendant's appeal against the plaintiff and the first third party with no order as to costs;

(ii) allowed the defendant's appeal against the second third party; and

(iii) dismissed the plaintiff's cross-appeal with no order as to costs.

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[8] Following our decision, the second third party had filed an application for leave to appeal to the Federal Court.

[9] We now give our reasons for allowing the defendant's appeal against the second third party.

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[10] The outline background facts of the case concerning the defendant and the second third party are as follows. The plaintiff and the defendant are media companies. The defendant carried on the business of selling "time slots" for advertisements to its clients who wish to advertise their products/services in all forms of media. The defendant appointed the plaintiff as the media agency to purchase the timeslots for this purpose. The plaintiff provided to the defendant "media services", meaning the plaintiff placed and paid for "advertisement placements/bookings" in the print and electronic media for the defendant. For the media services rendered, the plaintiff enjoyed agency commissions, which constituted its profits.

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[11] The plaintiff sued the defendant for unpaid media services rendered. The defendant failed to pay the remaining sum claimed by the plaintiff because it did not receive the payment from the second third party.

[12] The defendant then commenced third party proceedings against the second third party; this was essentially a claim by the defendant to be indemnified by the second third party. To this end, the defendant asserted that it had a contract with the second third party for the supply of media services. The defendant contended that the media plans were the basis of the contract with the second third party.

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[13] The crux of the defendant's case was that it had obtained the media contract from the second third party and in turn, it had appointed the plaintiff to place and secure the bookings in the print and electronic media for the second third party. The plaintiff would then invoice the defendant for the media services rendered.

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A [14] The dispute in this case arose when the defendant failed to pay the balance sum to the plaintiff for the media services rendered for the benefit of the second third party. As we have said earlier, the defendant's failure was because it did not receive payments from the second third parties.

B [15] It is necessary to make the point that the defendant claimed to be indemnified by the second third party in the event the court found liability against it as against the plaintiff.

C [16] The defendant's claim against the second third party is condensed in para. 3 of the defendant's amended statement of claim against the third parties:

3. Defendan telah pun memfailkan Pernyataan Pembelaan pada 26.1.2011, sesalinan yang sama telah diserahkan kepada Pihak Ketiga dan Pihak ketiga Kedua, di mana dakwaan Plaintiff adalah dinafikan dan Defendan seterusnya menyatakan seperti berikut:

D (i) Defendan terlibat dalam bidang media di mana Defendan akan menjual "slot" masa untuk pengiklanan kepada klien Defendan yang ingin mengiklankan produk/servis mereka antara lain di media elektronik, surat khabar, majalah, radio dan televisyen.

E (ii) Defendan telah dilantik oleh Kementerian Belia dan Sukan Malaysia [KBS] untuk mengiklankan aktiviti-aktiviti KBS antara lain di media elektronik seperti televisyen dan suratkhbar melalui surat bertarikh 25.5.2007.

(iii) Defendan telah melantik Plaintiff sebagai agensi media yang membeli "slot" masa untuk KBS melalui surat bertarikh 27.2.2007.

F (iv) Adalah dipersetujui antara Defendan dan Plaintiff bahawa Plaintiff hanya akan dibayar selepas penerimaan bayaran daripada KBS sahaja dan bukan sebelum dan/atau bila diminta/dituntut oleh Plaintiff dan perkara ini dalam pengetahuan Plaintiff pada semua masa yang material.

G (v) Defendan telah dilantik oleh Majlis Sukan Negara Malaysia [MSN] untuk mengiklankan aktiviti-aktiviti MSN antara lain di media elektronik seperti televisyen dan suratkhbar melalui Media Plan bertarikh 12.2.2007, 13.3.2007 dan 17.4.2007.

H (vi) Defendan telah pada semua masa yang material menghantarserah kepada MSN invois-invois untuk kerja-kerja yang dilakukan dan/atau untuk perkhidmatan yang telah diberikan tetapi sehingga kini MSN telah gagal, enggan dan/atau ingkar untuk menyelesaikannya.

I [17] As can be seen above, the defendant's claim against the second third party was made on the basis that the media services were at the request and for the benefit of the second third party, pursuant to an agreement between the defendant and Majlis Sukan Negara/the second third party. Furthermore, the second third party had made payments to the defendant for the media services.

[18] In dismissing the defendant's claim against the second third party, the High Court held that the earlier payments made by the second third party to the defendant was made in breach of Treasury Instructions and that there was no proper written contract with the second third party. In the words of the learned High Court Judge:

As for MSN, the evidence suggests payments were made upon the instruction of the then Minister of Youth and Sports, but these were in breach of Treasury Instructions. The testimony of WSTP 2(3) [Abdul Rashid bin Yaakub] is particularly clear on this. MSN as a statutory body is subject to defined financial procedures, and these will include the requirement of local orders and defined process of open tenders and negotiated contracts (where applicable). The same point is made that on the facts of this case, there is no proper written contract with MSN, and as such the payments made previously were in fact in breach of payment procedures. MSN has since refused to make further payments. I take notice that there was an investigation by Badan Pencegah Rasuah in relation to the payments made by MSN sometime at the end of 2007, and thereafter, according to Abdul Rashid, he has not received any further instructions from the Minister to effect payment.

[19] Before us, the main thrust of the contention of the defendant's learned counsel was that the High Court fell into error in failing to consider and recognise that the second third party had received all the benefits of the acts done by the defendant, that is to say, media bookings and services rendered by the plaintiff on behalf of the defendant and yet, the second third party had not paid fully for it. Learned counsel submitted that that the media services rendered did not benefit the defendant in any manner whatsoever, as the defendant was merely a media specialist agency, who worked on a commission basis. The defendant was not the end user who benefited from the advertisements. Yet, the defendant was now liable to bear the entire costs of the media services and pay the plaintiff in full. Learned counsel added that there was a valid and binding agreement between the defendant and the second third party for the supply of media services.

[20] In refuting the contention of the defendant, learned counsel for the second third party took the position that there was no valid contract between the defendant and the second third party for the supply of media services. He argued that the Treasury Instructions on procurement relating to the defendant had not been complied with and previous payments to the defendant were made due to express instructions by the then minister; if not for the minister's instructions, payments would not have been made to the defendant because the Treasury Instructions had not been complied with. As such, he argued, payments cannot be lawfully made to the defendant.

[21] We had given our utmost consideration of the submissions of both sides but we found ourselves quite unable to agree with the submissions of learned counsel for the second third party. Our reasons now follow.

A [22] Now, on the issue of the existence of a contractual relationship between the defendant and the second third party, it is important to note that the second third party had agreed to the media plans (see pp. 1017 to 1020, vol. 2(5) of the appeal record), which were proposed by the defendant. The second third party is a statutory body established under the provisions of the
B National Sports Council of Malaysia Act 1971 (Act 29). We should add the second third party has the power to enter into any contract (see s. 4(2)(g) of the Act 29). As can be seen these media plans were addressed to the second third party. The then Director General of the second third party, Dato' Dr Ramlan bin Abd Aziz, (TP2(1)) had signed and thereby approved these
C media plans on behalf of the second third party. The defendant's Chief Executive Officer, Choy Lup Soon (DW4), confirmed this. Evidence was also led that the then Minister directed TP2(1) at the relevant time to sign the media plans.

D [23] As it turned out, the second third party had received the benefits of the media services rendered by the plaintiff on behalf of the defendant. The second third party's witness, Dato' Chek Zolkples bin Embong, (TP2(2)) admitted paying the defendant on the invoices sent by it on instructions of the Minister. On top of that, the second third party's witness Abdul Rashid bin Yaakub, (TP2(3)) who was at the material time the Pengarah Bahagian
E Khidmat Pengurusan, confirmed that the second third party had paid around RM9 million to the defendant. Thus, there was acceptance on the part of the second third party by way of performance.

F [24] The second third party knew that work was carried out in terms of the media services and there were never any objections from the second third party of the services provided. The second third party had accordingly made payments to the defendant for the media services provided. In *Fitzpatrick Contractors Ltd v. Tyco Fire and Integrated Solutions (UK) Ltd* [2008] EWHC 1301 (TCC), the court quoted with approval the remarks of Steyn LJ, in *G Percy Trentham Ltd v. Archital Luxfer* [1993] 1 Lloyd's Rep 25; (1993) 63 BLR 44; [1992] BLM (December) 5 (CA) when he said:
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that the fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations. It will often be difficult to submit that the contract was void for vagueness or uncertainty. Specifically, the fact that the transaction was executed makes it easier to imply a term resolving any uncertainty, or,
H alternatively, it may make it possible to treat a matter not finalised as inessential.

I [25] In this regard, s. 8 of the Contracts Act 1950 provides that performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal. The defendant acted in good faith and performed the contract. There has been no evidence led to show that the defendant acted illegally or dishonestly in the commercial dealing between the parties.

[26] For those reasons, the learned High Court Judge fell into error and erred in law when he decided that there was no valid contract between the defendant and the second third party. This indicates a lack of judicial appreciation on the part of the learned High Court Judge resulting in the defendant being prejudiced. In our judgment, there was a serious error warranting appellate intervention.

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[27] We now need to turn our attention to the contention of learned counsel for the second third party to the effect that the procedures under the Treasury Instructions relating to procurement had not been complied with; as such, payments cannot be lawfully made to the defendant.

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[28] In the first place, the second third party never pleaded in its defence that there was a breach of Treasury Instructions. It was also never pleaded that as a result of such breach, the contract was invalidated. It is a well settled legal principle that the court should not decide on an issue that was not pleaded by the parties as had been decided in *Yew Wan Leong v. Lai Kok Chye* [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330 where the Supreme Court cited *Janagi v. Ong Boon Kiat* [1971] 1 LNS 42; [1971] 2 MLJ 196 and agreed with the following passage of Sharma J which stated:

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The court is not entitled to decide a suit on a matter on which no issue has been raised by the parties. It is not the duty of the Court to make out a case for one of the parties when the party concerned does not raise or wish to raise the point. In disposing of a suit or matter involving a disputed question of fact; it is not proper for the Court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. The trial of a suit should be confined to the pleas on which the parties are at variance.

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[29] In our judgment, the issue of Treasury Instructions is an internal matter of the second third party and hence the non-compliance by the second third party, if any, bears no bearing on the contractual obligation of the parties (see *Macrotac Enterprise & Ors v. Pengarah Pendidikan Negeri Selangor & Ors* [2010] 8 CLJ 592). Failure on the part of second third party to comply with the Treasury Instructions did not in any manner invalidate a contract that the defendant had entered into; the Treasury Instructions could not possibly bind the defendant (see *Pengarah Pelajaran Wilayah Persekutuan & Ors v. Loot Ting Yee* [1981] 1 LNS 186; [1982] 1 MLJ 68).

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[30] More important, it was never proven during the trial that the defendant was aware of any breach of the provisions of the Treasury Instructions. As submitted by learned counsel for the defendant, there is no reason for the defendant to think that the second third party had not complied with its own internal procedures on payment when in fact the second third party had been making consistent payments to the defendant from June 2007 to February 2009.

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A [31] It is for all these reasons that we had allowed the defendant's appeal with no order as to costs against the second third party by setting aside the order of the High Court in so far as the second third party was concerned.

B [32] Accordingly, judgment was entered against the second third party as prayed in para. 5(a) and (c) of the defendant's amended statement of claim against the third parties.

[33] We further ordered that the deposit to be refunded to the defendant.

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